

Advisory Opinion

IECDB AO 2008-04

May 5, 2008

TO ALL INTERESTED PERSONS:

Pursuant to Iowa Code section 68B.32A(11) and rule 351—1.2, the Iowa Ethics and Campaign Disclosure Board issues this opinion on members of boards and commissions selling or leasing goods or services to their own agencies. We note at the outset that the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

OPINION:

The issue has been raised concerning whether or not a member of a board or commission can sell or lease goods or services to the agency the board or commission is part of when the sale or lease is done in the member's capacity as a private sector citizen.

Several sections of Iowa Code chapter 68B and the Board's rules on executive branch ethics in 351—Chapter 6 potentially apply to this issue.

First, Iowa Code section 68B.2A prohibits a person who "serves or is employed by the state" from engaging in "any outside employment or activity which is in conflict with the person's official duties and responsibilities." The statute then sets out three situations deemed to be an impermissible conflict of interest including when the "outside employment or activity is subject to the official control, inspection, review, audit or enforcement authority of the person, during the performance of the person's duties of office or employment." ¹

Therefore, the member of the board or commission who wants to sell or lease goods to the member's own agency is required to refrain from taking any "official action" or "official duty" in participating, on behalf of the state, in any decision involving the sale or lease. ²

Second, Iowa Code section 68B.3 and Board rule 351—6.10 prohibit, in pertinent part, an "official" ³ from selling "any goods or services having a value in excess of two thousand dollars to any state agency unless the sale is made pursuant to an award or contract let after public notice and competitive bidding." This express language makes it clear that a board or commission member making a sale to any state agency, even his

or her own agency, cannot do so in excess of \$2,000 unless the sale is done by competitive bid. If the value of the sale is less than \$2,000, then the sale may be done without a competitive bid so long as the member of the board or commission complies with the conflict of interest provisions already discussed.

Third, Iowa Code section 68B.4 and Board rule 351—6.11 place limitations on the ability of an “official” of a “regulatory agency”⁴ from selling or leasing goods or services to “individuals, associations, or corporations subject to the regulatory authority” of the agency. We do not believe that an agency of the executive branch of state government is an “individual, association, or corporation” triggering the statutory limitation. Therefore, Iowa Code section 68B.4 and rule 351—6.11 do not apply to this particular issue.

In closing, we note that Board rule 351—6.9 provides that no official “shall disclose or use confidential information, including the contents of a sealed bid acquired during the course” of the official’s state duties “for the personal gain or benefit of any person.”

To summarize:

1. The official must refrain from engaging in an impermissible conflict of interest under Iowa Code section 68B.2A.
2. If it is a sale of goods or services, the sale may not be more than \$2,000 unless it is competitively bid pursuant to Iowa Code section 68B.3 and Board rule 351—6.10.
3. The limitations on sales/leases by regulatory agencies under Iowa Code section 68B.4 and Board rule 351—6.11 do not apply.
4. The person may not use confidential information acquired as part of state duties as prohibited by Board rule 351—6.9.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair
Janet Carl, Vice Chair
Gerald Sullivan
Betsy Roe
John Walsh
Patricia Harper

Submitted by: W. Charles Smithson, Board Legal Counsel

¹See Iowa Code section 68B.2A(1)“c”.

² See Iowa Code section 68B.2A(2) “b” that would require public disclosure of the conflict and sets out the parameters of what refraining from “official action” or official duty” encompasses.

³See Iowa Code sections 68B.2(17) and 7E.4 that define “official” to encompass members of most boards and commissions of state government.

⁴See Iowa Code section 68B.2(23) and Board rule 351—6.11(2) for a list of those agencies of state government that are defined as being “regulatory agencies.”